

## SHIU GOVIND

A

v.

## REGINAM

[SUPREME COURT, (Hammett P.J.), 7th September, 4th October]

B

## Appellate Jurisdiction

*Criminal law—charge—laid under wrong regulation—not curable on appeal by amendment or by application of the proviso—Criminal Procedure Code (Cap. 9) ss. 123(a) (ii), 204(1), 325(1)—Traffic (Construction and Use) Regulations 1955, regs. 44(1), 45(1), 57—Traffic Ordinance (Cap. 235) s.2—Food and Drugs Act 1938 (1 & 2 Geo. 6, c.56) (Imperial) s.24(1)—Food and Drugs Act 1950 (14 Geo. 6, c.35) (Imperial) s.9(1).*

C

*Criminal law—proviso to section 325(1) Criminal Procedure Code (Cap. 9)—not available to cure conviction on charge laid under wrong regulation.*

The appellant was convicted of carrying excess passengers contrary to regulation 44(1) of the Traffic (Construction and Use) Regulations, 1955. On the facts it appeared clear that the wrong regulation had been referred to in the Statement of Offence and that the appropriate regulation was regulation 45(1).

D

*Held:* The conviction was bad: it was not open to the Supreme Court on appeal either to amend the charge or to sustain the conviction by applying the proviso to section 325(1) of the Criminal Procedure Code.

Cases referred to: *Meek v. Powell* [1952] 1 K.B. 164; [1952] 1 All E.R. 347; *Martin v. Pridgeon* (1859) J.P. 630; 8 Cox C.C. 170; *Hunter v. Coombs* [1962] 1 All E.R. 904; 126 J.P. 300; *R. v. Taylor* (1924) 18 Cr. App. R. 105.

E

Appeal from a conviction by the Magistrate's Court.

F. M. K. Sherani for the appellant.

F

K. C. Gajadhar for the respondent.

HAMMETT P.J.: [4th October, 1962]—

The Appellant was convicted by the Magistrate's Court sitting at Sigatoka of the following offence:

“ *Statement of Offence*

G

CARRYING EXCESS PERSONS: Contrary to Regulations 44 (1) and 57 of Traffic (Construction and Use) Regulations of 1955, Legal Notice No. 91.

*Particulars of Offence*

SHIU GOVIND son of Shiu Shankar, on the 12th day of May, 1962, on the Valley Road at Lawai Sigatoka, in the Western

H

Division, being the driver of Public Service Vehicle Reg. No. 3205 carried 68 persons contrary to the conditions of its licence which permits the carriage of 43 persons only.

A The first ground of appeal reads:

"1. That the charge against Your Petitioner was wrongly framed inasmuch as Regulation 44(1) of the Traffic (Construction and Use) Regulations 1955 deal with goods vehicles and not with public service vehicles."

B Regulation 44(1) of the Traffic (Construction and Use) Regulations 1955 reads as follows:

"44(1) Except with the prior authorisation of a licensing authority, no person shall cause or permit a greater number of passengers to be carried in a goods vehicle than the number which the vehicle is authorised to carry under the terms of its licence."

C The definition of a goods vehicle is contained in the Traffic Ordinance, Section 2 of which the material part reads:

"'goods vehicle' means a motor vehicle which is constructed or adapted or primarily used for the conveyance of goods or merchandise of any description in connection with trade, business or agriculture . . . ."

D The material part of the definition of a public service vehicle in the same section reads:

"'public service vehicle' means a motor vehicle used for carrying passengers for hire or reward."

E The evidence disclosed without any doubt that the vehicle driven by the Appellant was a "bus" or a public service vehicle carrying 68 passengers which was said to be 25 in excess of the number authorised by its licence, and was not a goods vehicle.

It is clear that the statement of offence was in error in its reference to the section of the enactment creating the offence, since Regulation 44(1) does not apply to public service vehicles or buses but only to goods vehicles.

F Section 123 of the Criminal Procedure Code sets out the rules to be followed in framing charges and the material part of sub-section (a) (ii) reads:

"The statement of offence . . . if the offence charged is one created by enactment shall contain a reference to the section of the enactment creating the offence."

G For the Crown it was submitted that the reference to Regulation 44(1) in the Regulations was a clerical or typing error for Regulation 45(1), of which the material part reads:

H "45(1) No person shall cause or permit a greater number of passengers to be carried in a public service vehicle than the number which the vehicle is licensed to carry."

It would certainly appear that this may well have been the case.

The Crown submits that in this event there has been no miscarriage of justice and asks that the Court apply the proviso to Section 325 (1) of the Criminal Procedure Code which provides that an appeal may be dismissed if the Supreme Court considers that no substantial miscarriage of justice has actually occurred.

The point under appeal is clearly a technical one and I would be disposed to apply the proviso if I felt it was proper to do so.

In this event, however, this Court would be acting directly in conflict with and in face of the express provisions of both section 123 (a) (ii) to which I have already referred and section 204 (1) of the Criminal Procedure Code which provides that a defective charge may only be amended during a trial "before the close of the case for the prosecution".

In *Meek v. Powell* [1952] 1 All E.R. 347 a similar, what might be termed, "technical point" arose where the Appellant was convicted on a charge of selling, for human consumption, milk to which had been added water. The statement of offence stated the enactment creating the offence was the Food and Drugs Act 1938, Section 24 (1). This enactment had then only recently been repealed and replaced by a fresh enactment but the section creating the particular offence was re-enacted in absolutely identical words by section 9 (1) of the Food and Drugs Act 1950.

A Divisional Court of the Kings Bench Division consisting of Lord Goddard C.J., Parker and Byrne JJ. held that the conviction was bad in law and must be set aside. In the course of his judgment Lord Goddard C.J. said:

"If this had been a conviction on an indictment which charged an offence under the wrong section it seems clear that the Court of Criminal Appeal would have no option but to quash the conviction although the Court of trial would have had power to amend the indictment."

And later:

"If an indictment mentions the wrong Act and a conviction takes place on that indictment unamended it is too late to come to the Court of Criminal Appeal and ask them to amend it. The Court of Criminal Appeal must quash the conviction."

Reference might also be made to the cases of *Martin v. Pridgeon*, 23 J.P. 630; *Hunter v. Coombs*, 126 J.P. 300 and *R. v. Taylor*, 18 Cr. App. R. 105 where the same principle was applied.

In this appeal the trial court could, had it appreciated the position in time, have amended the defective charge before the close of the case for the prosecution and then properly convicted the Appellant of an offence against Regulation 45 (1) of the same Regulations. This was not, however, done. He was in fact wrongly charged under Regulation 44 (1) and was wrongly convicted under Regulation 44 (1) and I do not think, at this stage, this Court may either perpetuate that wrong conviction by applying the proviso or rectify it by amending the charge and the conviction at this late stage, in view of the decision to which I have referred.

For these reasons I do, with some reluctance, allow the appeal and set aside the conviction and sentence imposed by the Court below.

*Appeal allowed.*